Supreme Court, U.S.
FILED
07-172 JUL 16 2007
OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

WILLIEANN D. MADISON,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

TONY L. AXAM
Counsel of Record
AXAM & ADAMS
662 MORELAND AVE., SE
ATLANTA, GA 30316
(404) 524-2233

Counsel for Petitioner

July 16, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether Petitioner's Fifth Amendment due process rights and Sixth Amendment right to be informed of the nature and cause of the accusation was violated when the government was allowed to prosecute Petitioner under 18 U.S.C. § 666 which is unconstitutionally vague and ambiguous in that it fails to define the meaning of the term "benefit", is unclear as to the constitutionally required jurisdictional provision which triggers application of the statute, and is inapplicable to the instant matter because the funds at issue in the instant matter are specifically excluded by Subsection 666(c)

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

A. United States Constitution Amendments 1

B. United States Code 2

STATEMENT OF THE CASE 2

GROUNDS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI 5

I. CERTIORARI IS APPROPRIATE TO RESOLVE A SPLIT IN THE CIRCUITS REGARDING THE APPLICABILITY AND BREADTH OF 18 U.S.C. § 666 ARISING FROM THE LANGUAGE OF THE STATUTE WHICH IS UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS IN THAT IT FAILS TO DEFINE THE MEANING OF THE TERM "BENEFIT" AND IS UNCLEAR AS TO THE CONSTITUTIONALLY

REQUIRED JURISDICTIONAL PROVISION WHICH TRIGGERS APPLICATION OF THE STATUTE 5

CONCLUSION 9

APPENDIX

Appendix A: Opinion, United States Court of Appeals for the Sixth Circuit (filed Apr. 16, 2007) 1a

Appendix B: Opinion, United States District Court for the Western District of Tennessee, Memphis Division (filed Apr. 14, 2005, REDACTED VERSION) 30a

Appendix C: 28 U.S.C. § 666 ..... 40a

TABLE OF AUTHORITIES

Cases

Fischer v. United States,
529 U.S. 667, 120 S. Ct. 1780 (2000) 5, 6, 7, 8

Salinas v. United States,
522 U.S. 52, 118 S. Ct. 469 (1997) 5, 7, 8

South Dakota v. Dole,
483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171
(1987) 6

United States v. Dakota,
197 F.3d 821 (6th Cir. 1999) 8

United States v. Grossi,
143 F.3d 348 (7th Cir.1998) 8

United States v. Kranovich,
244 F. Supp. 2d 1109 (9th Cir. 2003) 7, 8

United States v. Phillips,
219 F.3d 404, 411 (5th Cir. 2000) 7

United States v. Santopietro,
166 F.3d 88 (2d Cir. 1999) 8

United States v. Suarez,
263 F.3d 468 (6th Cir. 2001) 7, 8

United States v. Zwick,
199 F.3d 672 (3d Cir.1999) 8

United States Constitution

Fifth Amendment to the United States Constitution 2

Sixth Amendment to the United States Constitution . . . 2

U.S. CONST. Art. I, § 8, cl. 1 6

United States Code

18 U.S.C. § 3231 1

18 U.S.C. § 3742 1

18 U.S.C. § 666 . . . . . passim

18 U.S.C. § 666(b) 5, 6

18 U.S.C. § 666(c) 5, 6

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

Supreme Court Rules

S. Ct. R. 13.1 1

Petitioner WillieAnn Madison respectfully prays that a Writ of Certiorari issue to review the decision of the Sixth Circuit Court of Appeals entered on 16 April 2007.

OPINIONS BELOW

On 16 April 2007, the Sixth Circuit Court of Appeals entered its unpublished opinion. A copy of the order is attached hereto as Appendix "A".

JURISDICTION

The United States District Court for the Western District of Tennessee had original jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. An appeal, by the Petitioner, and a cross appeal, by the government, from that court's final judgment proceeded for review by the United States Court of Appeals for the Sixth Circuit, in accordance with 18 U.S.C. § 3742 and 28 U.S.C. § 1291. On 16 April 2007, the Sixth Circuit remanded the sentence imposed by the district court as it relates to the district court's failure to apply a two (2) point enhancement for abuse of trust, but affirmed the district court's decision that 18 U.S.C. § 666 was applicable to Petitioner's case.

Jurisdiction to entertain this appeal is invoked by the timely filing of this petition within the prescribed 90 days after entry of the judgment pursuant to 28 U.S.C. § 1254(1) and S. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. United States Constitution Amendments

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

B. United States Code

18 U.S.C. § 666 is reprinted, in its entirety, in Appendix "C" attached hereto.

STATEMENT OF THE CASE

Mrs. Madison's principal employment from 1996-1999 was as the executive director for Cherokee Children and Family Services (hereinafter "CCFS"), a non-profit organization established under the laws of the State of Tennessee for the purpose of promoting child welfare and development. The State of Tennessee, Department of Human Services administered a daycare subsidy program, which subsidized the payment of fees to daycare providers on behalf of eligible parents and guardians. The program was funded by the United States Department of Health and Human Services and the State of Tennessee. Following a competitive bidding process, CCFS contracted with the State as a "child care broker" to provide administrative services in connection with the State's subsidized childcare program. Mrs. Madison owned certain commercial property, which was leased to CCFS beginning in 1995. Her property rental business was conducted through "Affordable Homes," an unincorporated entity to which CCFS's rent was made payable.

On 20 November 2002 and 16 September 2003, a 25 count indictment and superseding indictment was returned against Mrs. Madison. Counts 20 and 21 of the indictment allege theft and embezzlement of government program funds by Mrs. Madison arising from the payments of $141,000 and $437,000, associated with "back rent", from CCFS to Affordable Homes. Count 22 alleged theft and embezzlement by Mrs. Madison of $250,000 belonging to CCFS and which constituted operating funds of CCFS derived from the fee

based commission for their services. The funds were used to purchase additional office space for CCFS. Counts 19 and 23 alleged theft and embezzlement by Mrs. Madison based on the use of CCFS funds for payment of travel expenses for CCFS staff and others on two occasions: (1) a Caribbean cruise in mid 1998; and (2) a charter bus trip to Xenia, Ohio in May 1999 coinciding with the college graduation of Mrs. Madison's daughter.

Trial commenced on 19 April 2004 and on 12 May 2004, the jury returned a verdict of guilty on all counts relevant to the instant petition. On 31 March 2005, the District Court, over Petitioner's objections, adopted the Pre-Sentence Report as its findings and Mrs. Madison was sentenced to serve 21 months incarceration on each count of conviction, to run concurrently, three years probation and restitution in the amount of $ 751,832.05.

On 14 April 2005, judgment was entered against Mrs. Madison and on 12 May 2005, Mrs. Madison filed a Notice of Appeal as to the final judgment. On appeal, Petitioner argued, among other things, that the indictment failed to properly charge an offense under 18 U.S.C. § 666 for theft concerning programs receiving federal funds and said counts should have been dismissed and that 18 U.S.C. § 666 was unconstitutional as applied to Mrs. Madison. The Sixth Circuit Court of Appeals rejected Mrs. Madison's argument stating that, for 18 U.S.C. § 666 to apply, there is no requirement that any of the federal funds given to the federal recipient or that malfeasance affected those federal funds.

On 16 April 2007, the Sixth Circuit Court of appeals affirmed Petitioner's convictions but remanded the case for re-sentencing on other grounds. This Petition for Writ of Certiorari timely follows.

GROUNDS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. CERTIORARI IS APPROPRIATE TO RESOLVE A SPLIT IN THE CIRCUITS REGARDING THE APPLICABILITY AND BREADTH OF 18 U.S.C. § 666 ARISING FROM THE LANGUAGE OF THE STATUTE WHICH IS UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS IN THAT IT FAILS TO DEFINE THE MEANING OF THE TERM "BENEFIT" AND IS UNCLEAR AS TO THE CONSTITUTIONALLY REQUIRED JURISDICTIONAL PROVISION WHICH TRIGGERS APPLICATION OF THE STATUTE

On appeal, Petitioner argued that 18 U.S.C. § 666 is inapplicable to the instant case because 1) her organization did not receive benefits as required by 18 U.S.C. § 666(b); 2) the funds which are the subject of the alleged theft and embezzlement charges were of the type specifically excluded from the application of the statute pursuant to 18 U.S.C. § 666(c); and 3) the statute is unconstitutionally vague and ambiguous in that it fails to define the term benefits. The Sixth Circuit Court of Appeals rejected Petitioner's claim holding that there is no requirement that any of the federal funds given to the federal recipient or that malfeasance affected those federal funds.

The decision entered here by the Sixth Circuit Court of Appeals is in conflict with decisions entered by the Court of Appeals in other circuits on this same important matter. Also, the decisions in some circuits seem inconsistent with the rulings of this Court in *Fischer v. United States*, 529 U.S. 667, 120 S. Ct. 1780 (2000) and *Salinas v. United States*, 522 U.S. 52, 118 S. Ct. 469 (1997). Certiorari is therefore

necessary to clarify the constitutionality and breadth of 18 U.S.C. § 666, particularly Subsections 666(b) and (c) with respect to the definition of the term "benefits" and what nexus between the criminal conduct and the federal funds ins required to trigger § 666.

This Court, in *Fischer* addressed these issues and held that Medicare payments received by health care organizations are benefits within the meaning of the statute, but acknowledged that "[o]ther cases may present questions requiring further examination and elaboration of the term 'benefits.'" *Fischer* 529 U.S. at 682, 120 S. Ct. at 1789. Petitioner posits that this is one such instance and that the instant matter is ripe for examination of whether the statute is applicable in the instant matter and whether the statute's failure to unambiguously define the term "benefits" is unconstitutional.

The issue as to the constitutionality of § 666(b) is best articulated by the dissent to this Court's opinion in *Fischer*, to wit, the Sixth Circuit's expansive application of § 666(b)

> is particularly inappropriate because § 666(b), or some similar jurisdictional provision, is constitutionally required. Section 666 was adopted pursuant to Congress' spending power, Art. I, § 8, cl. 1. We have held that the spending power requires, at least, that the exercise of federal power be related "to the federal interest in particular national projects or programs." *South Dakota v. Dole*, 483 U.S. 203, 207, 107 S. Ct. 2793, 97 L. Ed.2d 171 (1987) (internal quotation marks omitted). *See id.*, at 213, 107 S. Ct. 2793 (O'CONNOR, J., dissenting). Arguably, if Congress attempted to criminalize acts of theft or bribery based solely on the fact that-in circumstances unrelated to the theft or bribery-the victim organization received

> federal funds as payment for a market transaction, this constitutional requirement would not be satisfied.

Fischer, 529 U.S. at 689, 120 S. Ct. at 1793 (Thomas, J. dissenting)

> The majority opinion states that, in order
>
> to determine whether an organization participating in a federal assistance program receives "benefits," an examination must be undertaken of the program's structure, operation, and purpose. The inquiry should examine the conditions under which the organization receives the federal payments. The answer could depend, as it does here, on whether the recipient's own operations are one of the reasons for maintaining the program. Health care organizations participating in the Medicare program satisfy this standard.

Fischer 529 U.S. at 681, 120 S. Ct. at 1788-1789.

Whether Section 666 requires a connection between the funds received and the funds involved in the charged conduct is a subject of debate among the circuits since *Salinas v. United States,* 522 U.S. 52, 118 S. Ct. 469 (1997) and *Fischer, supra. U.S. v. Kranovich*, 244 F. Supp. 2d 1109 (9th Cir. 2003) While this Court's majority opinion in *Fischer* supports the view that no nexus between the federal funds and the criminal conduct is necessary, the Second, Third and Fifth Circuits agree with the dissenting justices in *Fischer* that, "although the conduct prohibited by section 666 need not actually affect the federal funds received by the agency, there must be some nexus between the criminal conduct and the agency receiving federal assistance." *U.S. v. Suarez*, 263 F.3d 468 (6th Cir. 2001) *citing United States v.*

Phillips, 219 F.3d 404, 411 (5th Cir. 2000). *See also, United States v. Dakota,* 197 F.3d 821 (6th Cir. 1999) (holding that § 666 does not require any connection between the misconduct and federal funds); *United States v. Grossi,* 143 F.3d 348 (7th Cir.1998) (holding that no federal nexus is required); *United States v. Santopietro,* 166 F.3d 88 (2d Cir. 1999) (holding that some federal connection to the misconduct is required); *United States v. Zwick,* 199 F.3d 672 (3d Cir. 1999) (requiring a connection between the misconduct and a federal interest). The Second, Third and Eleventh Circuits have found the statute ambiguous while the Fifth, Sixth, Seventh and Eighth Circuits have found that no link need exist because the statute is silent and the Supreme Court decisions leave open the discussions on both the definition of the term "benefits" and any required nexus between the criminal conduct and the federal funds.

The Sixth Circuit admits that "[t]he Supreme Court's position on the ability of 18 U.S.C. § 666 to reach all corruption in local and state agencies (the "federal recipient") is not altogether clear" and that the Court did not "resolve all doubt" as to the application of 18 U.S.C. § 666(b). *U. S. v. Suarez*, 263 F.3d 468 (6th Cir. 2001) The Ninth Circuit discussed *Salinas*, *Suarez* and *Fischer* in its decision in *U.S. v. Kranovich* and still found that some nexus between the criminal conduct and the federal funds is necessary.

Defendants in some U. S. circuits are being prosecuted under a statute where the government is not required to make a showing of a constitutionally required jurisdictional provision. It is unclear among the circuits what the applicable jurisdictional provision is and no current Supreme Court decision has served to clarify the issue for the circuits. The confusion and split among the circuits is further evidence of the ambiguity and vagueness of the statute. Thus, Certiorari

is appropriate to determine whether the statute is unconstitutionally vague, to clarify the vague and ambiguous language of the statute and to avoid any further encroachments on defendants' constitutional rights.

CONCLUSION

Based on the foregoing reasoning and citations of authority, Mrs. Madison respectfully prays that this Court grant the instant Petition for a Writ of Certiorari.

This 16th day of July 2007.

Respectfully submitted by:

TONY L. AXAM
AXAM & ADAMS
662 Moreland Avenue, S.E.
Atlanta, GA 30316
404-524-2233

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 05-5622, 05-5625, 05-5825, 05-5826

[Filed April 16, 2007]

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
WILLIEANN D. MADISON, Defendant-Appellant,	)
JOHN A. MADISON, Defendant-Appellant.	)

File Name: 07a0279n.06

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

OPINION

BEFORE: COOK and McKEAGUE, Circuit Judges, and EDGAR, District Judge.*

McKEAGUE, Circuit Judge. Co-defendants WillieAnn and John Madison, husband and wife, appeal their convictions and sentences for numerous counts of tax evasion, money laundering, conversion of property, and fraud. For the following reasons, the convictions are affirmed, Mr. Madison's sentence is affirmed, and Mrs. Madison's sentence is reversed and remanded.

I. BACKGROUND

Between 1996 and 1999, Mr. Madison worked as a certified public accountant; was self-employed as a minister; worked as the Director of the Little People's Child Development Center ("Little People's"), a day care; and participated with Mrs. Madison in a number of real estate and other financial ventures. Mrs. Madison's principal employment from 1996-1999 was as the executive director for Cherokee Children and Family Services, a non-profit organization that "brokered" federal financial assistance for the day care needs of low-income families.[1]

The defendants treated their personal property and the property of the businesses for which they worked as

---

* Honorable R. Allan Edgar, Senior United States District Judge for the Eastern District of Tennessee, sitting by designation.

[1] Another non-profit, Cherokee Children Nutrition Program, was run under the umbrella of Cherokee Children and Family Services; the organizations collectively are referred to as "Cherokee."

substantially interchangeable. In 1999, Mrs. Madison purchased at auction the property at 2755, 2759, 2763, 2771, and 2768 Colony Park Drive in Memphis, Tennessee, for a total price of $1,083,500. She paid $98,500 down on March 5, 1999, the day of the auction. In February of 1999, Mrs. Madison directed Cherokee to write her a check for a $141,000 retroactive "rent increase due"[2] on the office space she rented to Cherokee. Mrs. Madison used these funds to pay the down payment on the Colony Park property. On March 22, 1999, Mrs. Madison secured an *additional* retroactive increase in the rent, in the amount of $437,000. She used this money to pay part of the balance due on Colony Park. On April 1, 1999, Cherokee wrote a check for $250,000 to "Fund Management." Mrs. Madison endorsed the check as "Fund Management" and paid these funds also to the sellers of the Colony Park properties. A total of $834,000 of the purchase money for the Colony Park properties came from Cherokee.

In 1998, both defendants, a Cherokee employee, and nine of Mrs. Madison's relatives took a pleasure trip to London, for which Cherokee paid substantially all of the expenses. In May of 1999, Cherokee paid $2,554 for travel expenses for approximately thirty members of Mrs. Madison's family to attend the college graduation of Mrs. Madison's daughter. In 1999, Cherokee and Little People's also paid over $25,000 for seventeen members of Mrs. Madison's family to go on a Caribbean cruise. Cherokee also paid for a weekly cleaning service to clean not only its offices, but also the homes of Mrs. Madison and her mother.

---

[2] The monthly rent at that time was $6000.

In addition to misappropriating almost $1 million in Cherokee funds, Mr. and Mrs. Madison engaged in a systematic deception of both the IRS and the Tennessee Department of Human Services (the "TDHS"), the agency for which Cherokee brokered day care subsidies for the poor. Between 1996 and 1998, Cherokee paid Mrs. Madison $72,000 per year in rent for the Cherry Center property. In 1999, Cherokee paid Mrs. Madison $241,530 in rent for the Cherry Center property, in addition to the $437,000 "retroactive rent increase." By contrast, defendants' tax returns for 1996, 1997, and 1998 reflected $36,000 in rental income for the Cherry Center property; in 1999, the defendants reported $72,000 in rental income for the property.

Mr. Madison was paid at least $108,000 per year under contracts to perform accounting work for Cherokee Family and Children Services, Cherokee Children Nutrition Program, and Creative Learning Center, Inc.[3] However, on his tax returns, he reported $41,845 in total accounting income for 1996; $27,295 for 1997; $28,576 for 1998; and $40,000 for 1999. The defendants also omitted from their income tax returns $22,287.88 in 1997 and $6106.86 in 1998 in net profits for the A.C. Jackson day care, which they ran. In addition, in 1999, Mrs. Madison sold a parcel of real estate and provided financing; she failed to report the interest income from that mortgage. Mrs. Madison also failed to report as income Cherokee's payment of her personal

---

[3] Mr. Madison testified that he did *not* also have a $3000 per month accounting contract with Little People's; the prosecution impeached this testimony with a prior sworn statement that he *did* have such a contract. J.A. at 2865-68. Counting this contract, he would have received $144,000 annually in accounting income.

expenses for such items as clothing, travel, utility payments and cleaning services for her residence, and a cruise.

On the Form 990 returns Mr. Madison prepared for Cherokee in 1996, 1997, 1998, and 1999, he answered "no" to the question, "During the year, has the organization, either directly or indirectly, engaged in any of the following acts of any of its trustees, directors, officers, creators, key employees or members of their families, or with any taxable organization with which any such person is affiliated as an officer, director, trustee, majority owner, or principal beneficiary: . . . a sale, exchange, or leasing of property?" In fact, of course, Cherokee leased its offices from its executive director, Mrs. Madison.

One of the leases between Cherokee and Mrs. Madison for the Cherry Center property listed the size of the Cherry Center property as 20,000 square feet, a figure provided by Mrs. Madison. This figure also appeared on the copy of the Cherry Center lease provided to TDHS as a verification of the reimbursable costs in Cherokee's 2000 budget. In fact, the Cherry Center property contained 9,648 square feet, which Mrs. Madison knew. Finally, as part of a required disclosure regarding whether a broker of subsidized child care "would be placing children in child care providers that they had some sort of relationship with," Mrs. Madison wrote a letter to the TDHS, stating that she "owns properties where two nonprofit day care centers are operated in the Memphis area, but is not involved in the day-to-day operations of the centers." Transcript 4/20/04 at 176, 178. In fact, Mrs. Madison was in charge of the operations of Little People's.

Following a fifteen-day jury trial, Mrs. Madison was convicted on May 12, 2004, of four counts of Attempt to Evade or Defeat Tax in violation of 26 U.S.C. § 7201; one

count of False Statements on Tax Documents Under Penalty of Perjury in violation of 26 U.S.C. § 7206(1); two counts of False Statements on a matter within the jurisdiction of the federal government in violation of 18 U.S.C. § 1001; four counts of False or Fraudulent Claims against a department of the United States in violation of 18 U.S.C. § 287; five counts of Theft from Programs Receiving Federal Funds in violation of 18 U.S.C. § 666(a)(1); and five counts of Engaging in Monetary Transactions Involving Property Derived from Unlawful Activity in violation of 18 U.S.C. § 1957. Mr. Madison, who was tried jointly with Mrs. Madison, was convicted of four counts of Attempt to Evade or Defeat Tax in violation of 26 U.S.C. § 7201, and four counts of Aiding the Preparation of Tax Documents Containing False or Fraudulent Statements in violation of 26 U.S.C. § 7206(2).

Mrs. Madison was sentenced to twenty-one months' incarceration on each count, to run concurrently, and thereafter to three years of supervised release. She was also ordered to pay restitution in the amount of $751,832.04, and to forfeit over $1.1 million and the two Colony Park properties she had not yet sold, or substitute property of equivalent value. Mr. Madison was sentenced to ten months' imprisonment on each count, to run concurrently, and thereafter to three years of supervised release, to include ten months' home confinement. Mr. Madison was ordered to pay $564,832.04 in restitution, for which he was jointly and severally liable with Mrs. Madison; she bore sole responsibility for the remaining $187,000. Both defendants now appeal their convictions and sentences.

II. LAWFULNESS OF SEARCH

On April 1, 2001, Cherokee's board terminated the lease of the Colony Park premises between itself and the

defendants. On April 12, the court-appointed receiver for Cherokee's assets visited the Colony Park property. On April 17, with the receiver's free consent, an FBI agent investigating the activities of the defendants examined the contents of 2771 Colony Park Drive. Later that day, the FBI Agent served the receiver with a subpoena from the Grand Jury, which required the receiver to turn over certain records at the Colony Park office.

Mrs. Madison contends on appeal that the search of Cherokee's office space at 2771 Colony Park, Memphis, Tennessee, was unlawful and that all evidence obtained as a result of that search should have been suppressed by the district court.[4] "In reviewing a denial of a motion to suppress, we review the district court's legal conclusions *de novo* and its findings of fact for clear error." *United States v. Morgan,* 435 F.3d 660, 663 (6th Cir. 2006) (citing *United States v. Harris,* 192 F.3d 580, 584 (6th Cir. 1999)).

Police may lawfully search a location if they receive valid consent. *United States v. Morgan,* 435 F.3d 660, 663 (6th Cir. 2006) (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). This consent may be given by any person "'who possesse[s] common

---

[4] Contrary to the government's argument, whether Mrs. Madison has "standing" to contest the seizure of documents at Colony Park is not the proper inquiry for this court. Rather, "in determining whether a defendant is able to show the violation of his (and not someone else's) Fourth Amendment rights, the 'definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.'" *Minnesota v. Carter,* 525 U.S. 83, 88, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998) (quoting *Rakas v. Illinois,* 439 U.S. 128, 140, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)).

authority over or other sufficient relationship to the premises or effects sought to be inspected.'" *Id.* (quoting *United States v. Matlock,* 415 U.S. 164, 171, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974)). Common authority is

> mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

United States v. Waller, 426 F.3d 838, 845 (6th Cir. 2005) (quoting *Matlock,* 415 U.S. at 171 n.7). Common authority is not a function of actual ownership rights in the premises. *Id.* (quoting *Matlock,* 415 U.S. at 171 n.7). In fact, an actual owner does *not* have authority to give consent if the premises searched are occupied by his tenant.[5] *Wilhelm v. Boggs,* 290 F.3d 822, 826 (6th Cir. 2002).

The district court reasonably found based on the evidence that "at least one employee, Mrs. Weathers, continued to

---

[5] Nor need an occupant be a party to a lease agreement in order to have authority to consent. *See, e.g., United States v. Clutter,* 914 F.2d 775, 778 (6th Cir. 1990) (a twelve- and a fourteen-year-old boy had common authority to consent to a search of their parents' home where they were "routinely left in exclusive control of the house" and their parents' "possession of large quantities of marijuana was . . . open and patently non-exclusive"). Thus, the fact that Cherokee's board terminated the lease on April 1 and the search and subsequent seizure occurred on April 17 is not dispositive of whether Cherokee had authority to consent to the search.

work for Cherokee Children from the Colony Park location after April 1." Report and Recommendation on Motion to Suppress ("R.R.") at 8. Despite the termination of the lease on April 1, when the receiver took control of 2771 Colony Park Drive on April 12, Cherokee was still engaging in "use of the property" and had "common authority over" the premises. Thus, Cherokee itself had authority to consent to the search. The appointing court here ordered the receiver to "[t]ake exclusive custody, control and possession of all . . . effects, books and records of account and other papers and property or interests owned or held by the [Cherokee Corporations] . . . with full power to . . . receive and take possession of such receivership properties." R.R. at 9. Thus, the receiver exercised Cherokee's own authority, and had the authority to consent to the FBI agent's search of 2771 Colony

Park Drive.[6] *See Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 626 (6th Cir. 2003).

Mrs. Madison additionally argues that the seizure was invalid because the Grand Jury subpoena was facially defective. However, it is not necessary for the panel to decide this question, because the receiver voluntarily consented to the FBI agent's seizure of the materials. The district court found that the receiver "did not ask for a subpoena; he only asked that [the FBI agent] provide him with an inventory of the documents taken," and that the receiver said, prior to being served with a subpoena, that the FBI agent "was free to look around the building and to collect whatever files he needed." R.R. at 26-27. Consent to a search may be voluntary even if the person giving the consent has already been served with a subpoena for the items to be seized, to say

---

[6] The FBI agent also seized files in a locked closet at 2771 Colony Park Drive. Because the receiver stood in the shoes of Cherokee, he could consent to the search of a locked closet to which Cherokee had access. The fact that Cherokee as an entity had access to the closet is demonstrated by the fact that Cherokee employees other than Mrs. Madison had keys to the closet. Moreover, a Cherokee employee testified that Mrs. Madison had come to 2771 Colony Park and removed her personal possessions before April 17.

Mrs. Madison also argues that even if the receiver had authority to consent to a search of the Colony Park premises, he did not have authority to consent to a search of her office, which she sometimes, but not always, kept locked. However, she never so much as alleges what, if any, incriminating documents were seized from her office, nor contends that she was prejudiced by the admission of any particular document. *See Chambers v. Maroney*, 399 U.S. 42, 53, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970) (holding that the admission of evidence obtained as a result of an illegal search and seizure is subject to a harmless-error analysis).

nothing of the case here, where the receiver consented when he had not yet been served with a subpoena. *See United States v. Susskind*, 965 F.2d 80, 87 (6th Cir. 1992) (holding that the defendant's consent to search was voluntary although he had been served with a subpoena), *vacated*, 975 F.2d 1206 (6th Cir. 1992), *analysis adopted*, 4 F.3d 1400, 1401 (6th Cir. 1993) (en banc)); *see also United States v. Iglesias*, 991 F.2d 1519, 1522 (9th Cir. 1989) (the fact that an officer threatened the "issuance of a grand jury subpoena" held not "sufficient to render . . . consent [to search] involuntary").

The district court did not clearly err in finding the consent to be voluntary. Because a person lawfully in control of the premises consented to the search and to the removal of documents, Mrs. Madison's motion to suppress was properly denied.

III. SUFFICIENCY OF THE INDICTMENT

"The sufficiency of an indictment is reviewed *de novo*." *United States v. Gibson*, 409 F.3d 325, 331 (6th Cir. 2005). The statute prohibiting theft from a program receiving federal funds contains a jurisdictional limit, making it applicable only if the defendant steals from or defrauds an organization that "receives, in any one-year period, benefits in excess of $10,000 under a Federal program involving . . . [a] form of Federal assistance." 18 U.S.C. § 666(b). Mrs. Madison argues that the indictment was insufficient because instead of alleging that Cherokee received *benefits* in excess of $10,000, the indictment alleged that Cherokee received *federal assistance* in that amount.

"[A]n indictment is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant

against double jeopardy." *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005). Mrs. Madison has not made a colorable argument that the indictment here fails so much as one of these requirements. The indictment was not insufficient, but gave Mrs. Madison adequate notice of the charged offense -- namely, theft from an organization receiving federal benefits under 18 U.S.C. § 666.

IV. ADMISSIBILITY OF LAY OPINION TESTIMONY

A district court's decision to permit a witness offering opinion testimony to testify as a lay witness is reviewed for abuse of discretion. *JGR, Inc., v. Thomasville Furniture Indus.*, 370 F.3d 519, 524 (6th Cir. 2004). Mrs. Madison argues that the trial court improperly permitted FBI analyst Joe Ford to offer opinion testimony when he had not been offered as an expert witness. The Rules of Evidence permit a non-expert witness to testify "in the form of opinions or inferences" if these "are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701.

Mrs. Madison complains that Ford offered the conclusion that she would not have been able to purchase the Colony Park property without the Cherokee funds. She cites *JGR*, in which this court adopted the reasoning of the Fifth Circuit in *Dijo, Inc. v. Hilton Hotels Corp.*, 351 F.3d 679 (5th Cir. 2003). In *Dijo*, a "financial consultant," who was not offered as an expert, testified regarding the value to the plaintiff of a lost contract. 351 F.3d at 685, 686. The Fifth Circuit held that admitting this testimony was an abuse of discretion, because the witness's "'opinion . . . was based on preliminary

income figures and other information that he had received from [the plaintiffs founder],' and his 'appraisal . . . was [not] based upon his own independent knowledge Or observations.'" *JGR,* 370 F.3d at 525 (citations omitted) (quoting *Dijo,* 351 F.3d at 685-87). However, *Dijo* is distinguishable from this case. In *Dijo,* the witness offered an appraisal of the economic value of a lost contract, which necessary is a matter of opinion. Here, Ford merely examined the records of transactions involving Mrs. Madison's and Cherokee's accounts and stated the origin and the destination of funds.

The Eleventh Circuit recently addressed a similar situation in *United States v. Hamaker,* 455 F.3d 1316 (11th Cir. 2006). In that case, a company was billed not only for its own construction work, but also for construction performed on the personal property of its CEO. *Id.* at 1319. The government offered testimony to show that the company paid for the CEO's private projects. *Id.* at 1331. The Eleventh Circuit held,

> Contrary to Appellants' contention, the government was not required to certify Odom as an expert witness . . . . To prepare for his testimony, Odom simply added and subtracted numbers from a long catalogue of MCC records, and then compared those numbers in a straightforward fashion. As Odom himself explained at trial, while his expertise and the use of computer software may have made him more efficient at reviewing [the company's] records, his review itself was within the capacity of any reasonable lay person.

Id. at 1331-32. We find the Eleventh Circuit's reasoning to be persuasive, and applicable to Ford's testimony. His status as a financial analyst may, like the computer expertise of the

witness in *Hamaker,* have facilitated his review of accounting records. However, his conclusion that Mrs. Madison would not have been able to make the down payment on the Colony Park property without funds converted from Cherokee is a matter of arithmetic "within the capacity of any reasonable lay person." *See also Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1124 (10th Cir. 2005) ("A mathematical calculation well within the ability of anyone with a grade-school education is, in our opinion, more aptly characterized as a lay opinion under Fed. R. Evid. 701."). The district court thus did not abuse its discretion in permitting Ford's testimony.

V. SUFFICIENCY OF THE EVIDENCE

"The standard of review for [a] challenge as to the sufficiency of the evidence is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Davis,* 473 F.3d 680, 681 (6th Cir. 2007) (quoting *United States v. Woods,* 877 F.2d 477, 479 (6th Cir. 1989)). Mrs. Madison first contends that the government failed to prove attempted tax evasion under 26 U.S.C. § 7201, because there was not sufficient evidence of willfulness or of the commission of an affirmative act.

"A jury may, of course, find the requisite knowledge on defendant's part by drawing reasonable inferences from the evidence of defendant's conduct"; that is, willfulness can be proved by circumstantial evidence. *Ratzlaf v. United States,* 510 U.S. 135, 149 n.19, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994); *see also United States v. Bank of New England, N.A.*, 821 F.2d 844, 854 (2d Cir. 1987). The fact that a defendant filed a false tax return, without more, may constitute an affirmative act. *United States v. Garavaglia,* 566 F.2d 1056,

1058 (6th Cir. 1977). If the return was prepared by someone other than the defendant, more is required. In *United States v. Cor-Bon Custom Bullet Co.*, 287 F.3d 576 (6th Cir. 2002), this court held where a third party prepares a return, an affirmative act of evasion

> includes, but is not limited to, "conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income . . . [or] any conduct, the likely effect of which would be to mislead or to conceal."

287 F.3d at 579 (quoting *Spies v. United States*, 317 U.S. 492, 499, 63 S. Ct. 364, 87 L. Ed. 418, 1943 C.B. 1038 (1943)).

In this case, Mrs. Madison was convicted of evading tax in 1996, 1997, 1998, and 1999. Among the inaccuracies in reporting was her listing of only half the rent received for the Cherry Center property through 1998, and approximately 10% of the rent in 1999. There were four different leases between Mrs. Madison and Cherokee for the Cherry Center property covering overlapping time periods; the four leases showed three different monthly rent rates between them, none of which was the $3000 per month Mrs. Madison reported from 1996 to 1998.

Thus, Mrs. Madison was keeping a triple or quadruple set of records, which was an affirmative act concealing her real income. Moreover, from Mrs. Madison's conduct as a whole, including her extensive misappropriation of Cherokee funds for her own purposes and elaborate concealment of her activities from Cherokee, its auditors, and the government, the jury could certainly conclude that her under-reporting of

income was willfully calculated to enhance her own holdings and defraud the federal government.

Mr. Madison likewise argues that there was not sufficient evidence to convict him of attempted tax evasion in 1996, 1997, 1998, and 1999. In addition to the rental income from the Cherry Center property discussed above, Mr. Madison failed to report his accounting income from Cherokee Children and Nutrition, Creative Learning Center, and Little People's. In 1996, 1997, and 1998, he prepared the defendants' joint returns. As stated above, this constitutes an affirmative act. In 1999, the defendants' return was prepared by a law firm. However, Mr. Madison engaged in affirmative acts of evasion in that year as well. Although he prepared 1099 forms indicating the income of other Cherokee independent contractors, he failed to prepare any 1099 for himself as Cherokee's accountant. This failure entails "concealment of assets or covering up sources of income" and certainly as "conduct, the likely effect of which would be to mislead or to conceal." Thus, Mr. Madison engaged in affirmative acts to evade the payment of income taxes.

Mrs. Madison also contests her conviction for Making False Statements on Tax Documents in violation of 26 U.S.C. § 7206(1). This charge was based on the fact that she signed Cherokee's form 990 for 1999, which stated that Cherokee was not involved in any related-party real estate transactions, although Mrs. Madison knew that she was the lessor of Cherokee's office space. Mrs. Madison argues that the false statement was not material. "A matter is 'material' if it has a natural tendency to influence, or is capable of influencing or affecting, the ability of the IRS to audit or verify the accuracy of a tax return." *See United States v. Tarwater,* 308 F.3d 494, 505 (6th Cir. 2002) (citing *Neder v. United States,* 527 U.S. 1, 16, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). A

revenue agent for the IRS Tax Exempted Government Entities Division testified that if an entity reported that it engaged in related-party transactions, the IRS would ask seek documentation of such transactions during the audit interview, but would not do so if no such transactions were reported. Thus, a false answer to the question is capable of affecting and actually affects the ability of the IRS to perform an audit.

Mr. Madison contends that his conviction for aiding in the preparation of false tax documents in violation of 26 U.S.C. § 7206(2) was also invalid. The charges were based on his preparation of Cherokee's form 990 submissions for 1996-1999, which denied that Cherokee engaged in related-party transactions. He argues that because Mrs. Madison was acquitted of making false statements on tax documents for 1996, 1997, and 1998, he should not have been convicted for aiding in making false statements for those years. However, "'there is no . . . bar to prosecuting someone as an aider and abettor after an alleged de facto principal is acquitted.'" *United States v. Stewart,* 306 F.3d 295, 307 (6th Cir. 2002) (quoting *United States v. Yost,* 24 F.3d 99 (10th Cir. 1994)).

Mrs. Madison also contests her conviction for Making False Statements on a Matter within the Jurisdiction of the Federal Government in violation of 18 U.S.C. § 1001. She argues that her false statement regarding the square footage of the Cherry Center property was not willful, *see United States v. Rogers,* 118 F.3d 466, 470 (6th Cir. 1997) (quoting *United States v. Steele,* 933 F.2d 1313, 1318-19 (6th Cir. 1991) (en banc)), because she did not know that the number she gave was false, and that her statement that she was "not involved in the day-to-day operations" of the Little People's day care centers was actually true.

The word "willfully" has the same meaning in 26 U.S.C. § 7206(1), (2) as it does in § 7201. *United States v. Bishop,* 412 U.S. 346, 359-60, 93 S. Ct. 2008, 36 L. Ed. 2d 941 (1973). Thus, it seems reasonable to conclude that willfulness for purposes of § 7206(1) can be "established by drawing reasonable inferences from the available facts," as it can for purposes of § 7201. *See Bank of New England,* 821 F.2d at 854. Here, the government presented evidence that the square footage of the Cherry Center property had been discussed with Mrs. Madison. The evidence also showed that she was knowledgeable regarding real property transactions. This evidence, in conjunction with Mrs. Madison's broad practice of dishonest reporting and false rent charges, permitted a rational trier of fact to find that she was aware of the real square footage of the property, and misstated it deliberately.

Mrs. Madison's argument that the jury was required to find that her claim not to be involved in the day-to-day operations of Little People's was truthful is without merit. The government presented evidence that she made hiring decisions, set salaries and the fees clients were charged, approved time cards, and authorized purchases. The director of Little People's discussed the day care's business with Mrs. Madison two or three times a week. It was the province of the jury to determine whether the statement in the letter was true, and given the evidence they were eminently rational in finding it to be false.

Mrs. Madison argues that her conviction for Theft from a Program Receiving Federal Benefits in violation of 18 U.S.C. § 666(a)(1) was based on insufficient evidence because the government did not establish that she committed the offense willfully. The statute applies to one who "without authority *knowingly* converts" or "*intentionally* misapplies" the funds of an organization receiving federal benefits. 18

U.S.C. § 666(a)(1)(A) (emphasis added). Mrs. Madison's argument is, in essence, that her conversion of Cherokee's property was not knowing or intentional. This argument is not even facially meritorious. To violate the statute, she needed only to misapply intentionally funds which she knew not to be hers. As discussed above, the government presented evidence of her elaborate scheme to convert Cherokee's funds to pay for the Colony Park properties; her habitual use of the Cherokee American Express card for her personal expenses; and her efforts to conceal her conversion of Cherokee funds. The jury could rationally have concluded based on this evidence that Mrs. Madison knew Cherokee's property was not hers and that she intentionally converted it to her use despite this fact. In addition, because there was sufficient evidence to convict Mrs. Madison of theft under § 666(a)(1)(A), she was also properly convicted of Engaging in Monetary Transactions Involving Property Derived from Unlawful Activity in violation of 18 U.S.C. § 1957.

Finally, Mrs. Madison claims that the evidence was insufficient to convict her of Making False Claims Against a Department of the United States in violation of 18 U.S.C. § 287. However, she provides no hint as to what about the evidence was insufficient. Therefore, the panel need not address this assignment of error. *See United States v. Lanzotti,* 205 F.3d 951, 957 (7th Cir. 2000) ("It is not this court's responsibility to research and construct the parties' arguments."); *see also Figueroa-Rubio v. INS,* 108 F.3d 110, 112 (6th Cir. 1997). In sum, there was sufficient evidence for a rational trier of fact to conclude that both Mr. and Mrs. Madison were guilty of every offense of which they were convicted.

VI. CONSTITUTIONALITY OF 18 U.S.C. § 666 AS APPLIED

A "challenge to the constitutionality of the application of § 666 involves questions of law," and is therefore reviewed *de novo*. *United States v. Suarez*, 263 F.3d 468, 476 (6th Cir. 2001). As a jurisdictional requirement for conviction under § 666, "the [victim] organization, government, or agency [must] receive[], in any one year period, benefits in excess of $10,000 under a Federal program." 18 U.S.C. § 666(b); *see also Suarez*, 263 F.3d at 484. Mrs. Madison argues that § 666 was unconstitutional as applied to her because she did not convert Cherokee's federal benefits themselves, but rather the fee the federal government paid Cherokee to administer those benefits. Her argument has been rejected by this court. "A defendant under 18 U.S.C. § 666 need not be shown to have actually stolen any of the federal funds given to the 'federal recipient' or even that his malfeasance affected those federal funds." *Suarez*, 263 F.3d at 484 (citing *United States v. Salinas*, 522 U.S. 52, 55-58, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997)).

To determine whether the conversion of the assets of a funded program falls under § 666, the Supreme Court in *Fischer v. United States*, 529 U.S. 667, 120 S. Ct. 1780, 146 L. Ed. 2d 707 (2000),

> recommend[ed] a fact-based inquiry into the "program's structure, operation, and purpose" to determine whether the criminal conduct posed a threat to the integrity of *the federal program.* If it does pose such a threat (as was found with defendant Fischer's conduct), then the statute may be applied

> constitutionally, regardless of whether the federal funds are affected directly.

Suarez, 263 F.3d at 486 (quoting *Fischer*, 529 U.S. at 681-82) (citation omitted) (emphasis added). Cherokee's purpose was to disburse federal and state funds appropriated to help low-income families pay for day care, and the evidence showed that Mrs. Madison's continual self-dealing endangered Cherokee's non-profit status. The loss of that status, and the resulting significant tax liability, would certainly have threatened the integrity of Cherokee's program. Therefore, under the standard in *Suarez* and *Fischer*, § 666 was constitutional as applied to Mrs. Madison.

VII. CONSTITUTIONALITY OF FACTFINDING BY SENTENCING JUDGE

Defendants assert that their sentences violated the Sixth Amendment as interpreted in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), because their guidelines ranges were based on facts found by the judge rather than the jury. In fact, *Booker* explained that the remedy for the Sixth Amendment violation inherent in the guidelines sentencing scheme was not that all sentencing facts be found by a jury, but that sentencing courts apply the guidelines as advisory. *Id.* at 259-60. The district court here did so. The defendants' argument is therefore meritless, and in fact has already been rejected by this court. *United States v. Davis*, 397 F.3d 340, 352 (6th Cir. 2005) (Cook, J., concurring); *see also United States v. Wood*, 188 F. App'x 353, 354-55 (6th Cir. 2006).

VIII. ORDERS OF FORFEITURE AND RESTITUTION

"We review the district court's interpretation of the federal forfeiture laws *de novo*. But the district court's findings of fact are reviewed under a clearly erroneous standard and the question of whether those facts are sufficient to constitute a proper criminal forfeiture is reviewed *de novo*." *United States v. O'Dell*, 247 F.3d 655, 679 (6th Cir. 2001) (citations omitted). "'We review *de novo* whether a restitution order is permitted under the law. If it is, then the amount of restitution ordered is reviewed under the "abuse of discretion" standard.'" *United States v. Johnson*, 440 F.3d 832, 849 (6th Cir. 2006) (quoting *United States v. Wood*, 364 F.3d 704, 714 (6th Cir. 2004)).

Mrs. Madison was ordered to forfeit $578,000, the sum of the $437,000 and $141,000 she converted from Cherokee. The judgment appears also to order, and the government to argue for, $147,000 and $437,000, the value of the checks that were proceeds of her unlawful transactions; and the parcels at 2771 Colony Park Drive and 2768 Colony Park Drive, also proceeds of the transactions. Mrs. Madison argues that the order to forfeit $578,000 "*in addition to* her real property is grossly disproportional to the gravity of the alleged offense." The forfeiture of the $578,000 Mrs. Madison converted is required by the terms of the forfeiture statute; a sentencing court "shall order" a person convicted of engaging in monetary transactions involving property derived from unlawful activity in violation of 18 U.S.C. § 1957 to "forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." 18 U.S.C. § 982(a)(1). Mrs. Madison's Brief at 57. At oral argument, the government conceded that "we can

go no farther than $578,000." Therefore, the forfeiture of property in excess of that amount is no longer an issue.

Mrs. Madison's claim that the forfeiture amount was excessive under the Eighth Amendment is not meritorious. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian,* 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). Mrs. Madison possessed the $578,000 only because she misappropriated it from Cherokee, and the amount therefore bears a direct relationship to the offense it is designed to punish. Finally, Mrs. Madison was not entitled to have the forfeiture amount found by a jury, because she expressly waived a jury determination. Fed. R. Crim. P. 32.2(b)(4); *see also United States v. Hall,* 411 F.3d 651, 654-55 (6th Cir. 2005) (finding no constitutional right to a jury determination of forfeiture).

Mrs. Madison was ordered to pay $751,832.04 in restitution. For $564,832.04 of that amount, which was based on tax losses to the IRS, she was jointly and severally liable with Mr. Madison. The remaining $187,000 was incurred by the receivership for Cherokee because the Cherry Center property, which Mrs. Madison deeded to Cherokee to cover the funds she converted under the guise of retroactive rent, sold for considerably less than the amount of the converted funds.

Mrs. Madison argues on appeal that the restitution amount was excessive and not supported by the evidence. A "district court must consider 'the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the

defendant and the defendant's dependents, and such other factors as the court deems appropriate' when ordering restitution." *United States v. Adams*, 214 F.3d 724, 730 (6th Cir. 2000) (quoting *United States v. Dunigan*, 163 F.3d 979, 981 (6th Cir. 1999)). The district court heard evidence at sentencing as to the amount of tax loss and loss to the receivership from the sale of the Cherry Center property.[7] It adopted the findings in the pre-sentence investigation report (the "PSIR"), which detailed the financial resources of the defendants, their earning ability, and their expenses. The district court thus considered all of the required factors.

Moreover, contrary to the defendants' assertions, they have the ability to pay the restitition award. The PSIR here concluded that the defendants were able to pay restitution because they had a net worth of $978,781, or $421,630, after subtracting the properties included in the forfeiture order; and a net monthly income of $7,311. The PSIR also addressed the assets and income of both defendants. Based on these findings, which the district court adopted, the restitution amount is consistent with the defendants' financial resources.

XI. SENTENCES

"The district court's decision to apply U.S.S.G. § 3B1.3 'is treated as a question of law in the Sixth Circuit. We review *de novo* the District Court's determination that [the defendant] occupied a position of trust for the purposes of the

---

[7] Both defendants incorrectly assert that the government failed to prove the amount of loss. They cite only the fact that the audit performed by TDHS found no losses as a result of their offenses. Because the TDHS audit examined losses to TDHS, and the receiver's testimony regarded losses to Cherokee itself, the results of the TDHS audit are irrelevant.

Sentencing Guidelines.'"[8] *United States v. Young*, 266 F.3d 468, 474 (6th Cir. 2001) (citation and some internal quotations omitted) (quoting *United States v. Brogan*, 238 F.3d 780, 783 (6th Cir. 2001)). This court examines the sentence itself to determine "whether [the] sentence is unreasonable." *United States v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005) (quoting *Booker*, 543 U.S. at 262-63). This review is both substantive, examining "the length of the sentence," and also procedural, requiring that the district court consider the factors in 18 U.S.C. § 3553(a), including the advisory guidelines range. *Id.* (quoting *United States v. Crosby*, 397 F.3d 103, 114 (2d Cir. 2005)).

Although the Guidelines are merely advisory following *Booker*, "[s]entencing courts must still take the guidelines into account and must construe the guidelines properly in doing so." *United States v. Forrest*, 402 F.3d 678, 684 (6th Cir. 2005). The government argues that Mrs. Madison's offense level should have been adjusted upward two levels based on her abuse of trust. "If the defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense," the sentencing court must increase the offense level by two. U.S.S.G. § 3B1.3. However, "[t]his adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic." *Id.*

---

[8] *But see United States v. Lang*, 333 F.3d 678, 682 (6th Cir. 2003) (citing *Buford v. United States*, 532 U.S. 59, 66, 121 S. Ct. 1276, 149 L. Ed. 2d 197 (2001)) ("We review the district court's application of § 3B1.3 under the 'clearly erroneous' standard where, as here, it is fact-bound."). The standard of review does not make a difference in this case, however, because the district court's determination was correct.

The district court made the factual determination that Mrs. Madison was "enable[d] to perpetrate" the thefts from a program receiving federal funds in violation of 18 U.S.C. § 666(a)(1) "largely . . . because of her position." Transcript 3/31/05 at 120. In determining whether the adjustment applies, this court examines "whether the defendant held a position of trust, and whether the position of trust facilitated the commission of the crime." *United States v. White,* 270 F.3d 356, 371 (6th Cir. 2001). The official commentary to the Guidelines explains that a position of trust is

> characterized by professional or managerial discretion . . . . Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense . . . .

U.S.S.G. § 3B1.3, Application Notes 1. The record indicates that it was Mrs. Madison who instructed Cherokee's director of operations to write checks, including checks to herself for sizable amounts. She also had the ability to write checks herself, which she used on the occasion she wrote a $250,000 check to the fictitious entity "Fund Management," by which device she was apparently able to conceal the conversion of those funds.

Given her use of authority to direct payments and write checks, Mrs. Madison clearly held a position of trust and relied on that position to convert Cherokee funds. In fact, this court held a defendant to have abused a position of trust based on substantially indistinguishable facts in *United States v. Freeman,* 86 F. App'x 35, 37-38, 43 (6th Cir. 2003) (chief

executive officer of federally-funded non-profit "had a tremendous amount of discretion" and used that to cause the organization to pay her mortgages without the knowledge of the directors). Thus, the district court correctly determined that Mrs. Madison abused a position of trust as defined in § 3B1.3.

The district court determined that the § 3B1.3 adjustment should not be applied, however, because Mrs. Madison's "conviction on those [§ 666(a)(1)] counts fairly subsume[s] the argument of abuse of trust and . . . no further enhancement is warranted." Transcript 3/31/05 at 120. This court held in *United States v. Brown*, 66 F.3d 124, 129 (6th Cir. 1995), that abuse of trust is not "a necessary element of the crime of embezzlement" under 18 U.S.C. § 666(a)(1). Although the government must prove that the defendant is an agent of a government or organization receiving federal benefits to obtain a conviction under § 666(a)(1), it does "not have to prove the degree of independence and discretion that the enhancement provision requires." *Id.* Therefore, the district court erred in not applying the two-level enhancement under § 3B1.3.

Because the district court erred in failing to make a two-level adjustment under § 3B1.3, Mrs. Madison's case must be remanded to the district court for resentencing consistent with that adjustment. *See United States v. Galloway*, 439 F.3d 320, 324 (6th Cir. 2006). However, Mrs. Madison's sentence is otherwise procedurally and substantively reasonable under *United States v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005), as is Mr. Madison's sentence.

The district court discussed each of the sentencing factors in 18 U.S.C. § 3553(a) in determining Mrs. Madison's sentence, and incorporated these comments in its sentencing

deliberation regarding Mr. Madison. This consideration of the factors was sufficient; as this court has frequently observed, "satisfaction of the procedural reasonableness requirement does not depend on a district court's engaging in a rote listing or some other ritualistic incantation of the relevant § 3553(a) factors." *United States v. Dexta,* 470 F.3d 612, 615 (6th Cir. 2006).

A sentence is "substantively plainly unreasonable" where "it is 'greater than necessary to comply with the purposes set forth in [§ 3553(a)(2)].'" *United States v. Yopp,* 453 F.3d 770, 773 (6th Cir. 2006) (alteration in original) (quoting 18 U.S.C. § 3553(a)). The Guidelines yielded a range of forty-one to fifty-one months for Mrs. Madison, and thirty-three to forty-one months for Mr. Madison. The district court decided to sentence both Mr. and Mrs. Madison to sentences significantly lower than the guidelines ranges: twenty-one months' incarceration plus three years of supervised release for Mrs. Madison, and ten months' incarceration followed by three years' supervised release for Mr. Madison, with ten months of home confinement as a condition of supervised release. The district court based its decision not only on the factors in § 3553(a), but also on Mrs. Madison's age and the fact that she was responsible to raise her five-year-old grandson, as well as the couple's standing in and support from the community.[9]

---

[9] Age, family responsibilities, and "employment-related contributions" and "prior good works" are discouraged factors for calculating Guidelines ranges. U.S.S.G. §§ 5H1.1, 5H1.6, 5H1.11. However, discouraged does not mean prohibited. *United States v. Bostic,* 371 F.3d 865, 875 (6th Cir. 2004). Moreover, the Sixth Circuit has held in an unpublished decision that although discouraged factors under the Policy Statements "were inappropriate for consideration under the mandatory guidelines,

The government argues that the sentences are shorter than is necessary to comply with the purposes of § 3553(a). However, the government has not refuted the district court's finding that, even without any term of incarceration, neither defendant would commit an offense again. The government's arguments with respect to the magnitude of the sentences also fail to address the accompanying orders of forfeiture and restitution, which total over $1 million. Under all the circumstances, it appears that the district court's sentences were substantively reasonable.

X. CONCLUSION

For these reasons, Mr. Madison's conviction and sentence are **AFFIRMED,** and Mrs. Madison's case is **REMANDED** for resentencing.

---

they provide a justification for a sentence decrease under the now-discretionary guidelines." *United States v. Briceno,* 136 F. App'x 856, 859 (6th Cir. 2005); *see also United States v. Jackson,* 408 F.3d 301, 305 (6th Cir. 2005).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
MEMPHIS DIVISION

Case No. 2:02CR20448-01-D

[Filed April 14, 2005]

REDACTED VERSION

UNITED STATES OF AMERICA	)
	)
v.	)
	)
WILLIEANN D. MADISON	)
	)

Tony L. Axam, Retained
Defense Attorney
1280 W. Peachtree St., #310
Atlanta, GA 30309

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant was found guilty on Count 1-4, 11, 13-14, 15-18, 19-23, 24-28 as well as the Forfeiture Count 29 of the Superseding Indictment on May 12, 2004. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
26 U.S.C. § 7201	Attempt to Evade of Defeat Tax	03/10/2001	1-4
26 U.S.C. § 7206(1)	False Statements on Tax Documents Under Penalty of Perjury	03/26/2000	11
18 U.S.C. § 1001	False Statements	12/21/1999	13-14
18 U.S.C. § 287	False or Fraudulent Claims	05/03/2000	15-18
18 U.S.C. § 666	Theft from Programs Receiving Federal Funds	12/31/1999	19-23
18 U.S.C. § 1957	Engaging in Monetary Transactions Involving Property Derived From Unlawful Activity	04/15/1999	24-28
18 U.S.C. § 982(a)(1)	Forfeiture	04/01/1999	29

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996

The defendant has been found not guilty on count(s) 5, 7, and 9 of the Superseding Indictment.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. [REDACTED]
Defendant's Date of Birth: [REDACTED]
Deft'S U.S. Marshal No.: 18663-076

Date of Imposition of Sentence:
March 31, 2005

Defendant's Mailing Address:
[REDACTED]

/s/
BERNICE B. DONALD
UNITED STATES DISTRICT JUDGE

April 13, 2005

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **21 Months** on each count to run **concurrently.**

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as notified by the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least

two periodic drug tests thereafter, as directed by the probation officer.

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthful all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

5. The defendant shall notify the probation officer **ten(10) days prior** to any change in residence or employment;

6. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

7. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

8. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

9. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

10. The defendant shall notify the probation officer within **72 hours** of being arrested or questioned by a law enforcement officer;

11. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

12. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

13. If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in

the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall make full financial disclosure as directed by the Probation Officer;
The defendant shall participate in DNA collection as directed by the Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment	Total Fine	Total Restitution
$2,100.00		**$751,832.04**

The Special Assessment shall be due immediately.

FINE

No fine imposed.

RESTITUTION

Restitution in the amount of **$751,832.04** is hereby ordered. The defendant shall make restitution to the following victims in the amounts listed below.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
David S. Weed, Phone No.: 615-293-5817 Receivership for Cherokee Children and Family Services P.O. Box 3089 Brentwood, TN 37024	$187,000.00	$187,000.00	
Internal Revenue Service 600 South Maestri Place Stop 65 New Orleans, LA 70130	$564,832.04	$532,832.04	

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column above.

The amount of loss and the amount of restitution ordered will be the same unless, pursuant to 18 U.S.C. § 3664(f)(3)(B), the court orders nominal payments and this is reflected in the Statement of Reasons page.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

E. Special instructions regarding the payment of criminal monetary penalties:

Defendant shall pay restitution in regular monthly installments of not less than 10% of gross monthly income. Court waived the interest requirement. The defendant shall notify the Court and the U.S. Attorney of any material change in economic circumstances that may affect defendant's ability to pay restitution.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant Name, Case Number, and
Joint and Several Amount:

John E. Madison, 02cr20448-02, $564,832.04

The defendant shall forfeit the defendant's interest in the following property to the United States: Criminal Forfeiture as set out in the Preliminary Order of Forfeiture entered on February 7, 2005. Forfeiture to **EXCLUDE** defendant's personal residence.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 31. EMBEZZLEMENT AND THEFT

18 U.S.C. § 666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists--

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that--

(i) is valued at $ 5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $ 5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such

organization, government, or agency involving anything of value of $ 5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $ 10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section--

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.